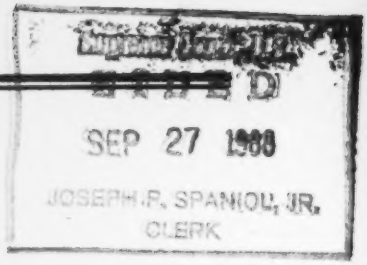
No. 88-191



IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

UNITED GAS PIPE LINE COMPANY,

Petitioner,

v.

LOUISIANA POWER & LIGHT COMPANY,

Respondent.

On Petition For A Writ of Certiorari To The Louisiana Court of Appeal, Fourth Circuit

BRIEF FOR LOUISIANA POWER & LIGHT COMPANY IN OPPOSITION TO THE PETITION

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September 27, 1988

QUESTION PRESENTED

Should this Court overturn the state court's judgment for damages in a suit brought by a customer of an interstate pipeline company for breach of contract where the state court expressly acknowledged the federal interest and made the requisite factual findings of fault in accordance with standards set by the Federal Energy Regulatory Commission?

STATEMENT REQUIRED BY RULE 28.1

The parent company of respondent Louisiana Power & Light Company ("LP&L") is Middle South Utilities, Inc. ("MSU"). Affiliates of LP&L and direct and indirect subsidiaries of MSU are Arkansas Power & Light Company, Mississippi Power & Light Company, New Orleans Public Service Inc., MSU System Services, Inc., System Energy Resources, Inc., System Fuels, Inc. and Electec, Inc.

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STATEMENT OF THE CASE

Louisiana Power & Light Company ("LP&L") is a public utility, organized under the laws of the State of Louisiana, engaged in the generation, transmission, and distribution of electricity in Louisiana. At times past, UNITED[1] contracted

1. United Gas Pipe Line Company is a Delaware corporation which is, among other things, a "natural gas company" within the meaning of the Natural Gas Act, 15 U.S.C. § 717, *et seq.*, with the result that some of its actions are subject to the jurisdiction of the Federal Energy Regulatory Commission, successor to the Federal Power Commission. On June 30, 1987, pursuant to a stock purchase agreement, UNITED's liability under the judgment sought to be reviewed here was assumed by others who are the real parties in interest. LP&L shows, at pp. 12-13, *infra*, that this is reason alone to deny the petition.

to sell natural gas to LP&L for use as fuel to generate electricity.[2] Some of LP&L's fuel costs are included in its retail electric rates which are regulated by the Louisiana Public Service Commission (the "LPSC") and the Council of the City of New Orleans ("New Orleans"). The LPSC and New Orleans intervened in the proceedings below in support of LP&L's suit seeking recovery of damages from UNITED for breach of contract and other wrongful acts.

This case arises from a judgment LP&L secured against UNITED for breach of contract.[3] The Louisiana state courts found that, during the years 1971 through 1981, UNITED, because of its prior improvident acts, failed to deliver con-

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2. The two contracts at issue were for sales for use at LP&L's Sterlington Station, dated February 2, 1956 and amended on November 30, 1966, December 2, 1969 and December 31, 1974, and for use at LP&L's Ninemile Point Station, dated May 6, 1968. Both contracts have expired, a fact which also suggests this matter does not warrant review by this Court. *See* pp. 15-16, *infra*.

3. Pet. App. A; Pet. App. C. LP&L filed suit September 5, 1974 against UNITED and its then parent Pennzoil Company. In addition to breach of contract, LP&L alleged violations of Louisiana antitrust and tort laws. These other actions against UNITED, and all actions against Pennzoil, were eventually dismissed. Later, LP&L filed suit against UNITED in the United States District Court for the Eastern District of Louisiana for different breaches of one of the contracts at issue here, and for violations of the Racketeer Influenced and Corrupt Organizations Act (RICO). That Court found UNITED breached certain pricing provisions of the contract during a time period which overlapped the breaches at issue here, and that "United committed a pattern of racketeering activity sufficient to trigger RICO liability." *Louisiana Power & Light Co. v. United Gas Pipe Line Co.*, 642 F.Supp. 781, 810 (E.D. La. 1986). That suit was later settled.

tract quantities of gas to LP&L, thereby causing millions of dollars of damages to LP&L and its ratepayers.[4]

A. The Application of UNITED's FPC/FERC Tariffs to LP&L

Although the issue UNITED now urges to this Court was first raised in the state courts in an application for rehearing to the Louisiana Court of Appeal,[5] UNITED has persistently proffered alleged federal interests and jurisdiction in efforts to avoid contract liability. Yet no court or agency, state or federal, has found any federal interest to be served by allowing UNITED to escape liability caused by its own fault.

UNITED initiated its program of developing federal defenses on October 1, 1970, when it filed an application with the Federal Power Commission for a Certificate of Public Convenience and Necessity to operate facilities in interstate commerce that were previously operated in intrastate commerce, including some serving LP&L. Since this application predated by only three weeks a petition by UNITED to the FPC announcing its inability to make full deliveries on its interstate system, some, including one FPC Commissioner, questioned UNITED's motives, but the FPC eventually held that UNITED's motives were irrelevant and that UNITED's flows of natural gas in interstate

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4. LP&L prayed for $240,918,849 in damages, but the District Court awarded $40,309,142, finding insufficient proof that all of LP&L's damages were caused by UNITED (Pet. App. C at 112a). On appeal, this award was increased to $89,984,003 (Pet. App. A at 75a).

5. UNITED initially argued to the state courts that the Federal Energy Regulatory Commission had misperceived the necessary federal interest, but UNITED changed its argument after it had lost state and federal appeals. *See*, pp. 9-11, *infra*.

commerce were unauthorized but nevertheless established jurisdiction in the FPC.[6] UNITED's petition to the FPC with a plan to allocate its insufficient supply was filed on October 26, 1970, and UNITED there sought a declaratory order that its curtailment plans were in accordance with its FPC tariffs and its "non-jurisdictional" direct sales contracts, including those with LP&L. This Court eventually held that it was within the FPC's jurisdiction under the Natural Gas Act to include non-jurisdictional direct sales contracts in curtailment plans.[7]

Although the FPC first thought that the mere adoption of a curtailment plan pursuant to its procedures would be an "absolute defense" to actions for breaches of contracts,[8] this view was uniformly rejected by federal appellate courts.[9]

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6. Opinion No. 610, *United Gas Pipe Line Co.*, 47 F.P.C. 245 (1972), *aff'd sub nom. Louisiana Power & Light Co. v. FPC*, 483 F.2d 623 (5th Cir. 1973), *cert. denied*, 416 U.S. 974 (1974).

7. *Federal Power Commission v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972). The FERC later held that UNITED's original tariff had no application to direct sales customers such as LP&L, but gave a new tariff retroactive effect. Opinion No. 237, *United Gas Pipe Line Co.*, 31 F.E.R.C. (CCH) ¶ 61,336 at 61,763 and 61,774 (1985) (Pet. App. E at 117a, 140a). On review, the United States Court of Appeals specifically affirmed this finding. *United Gas Pipe Line Co. v. FERC*, 824 F.2d 417 at 431-2 (5th Cir. 1987) (Pet. App. G at 187a-189a).

8. Opinion No. 606, *United Gas Pipe Line Co.*, 46 F.P.C. 786, 805 (1971); Opinion No. 647, *United Gas Pipe Line Co.*, 49 F.P.C. 179, 193 (1973).

9. *Monsanto Company v. FPC*, 463 F.2d 799 (D.C. Cir. 1972); *International Paper Co. v. FPC*, 476 F.2d 121 (5th Cir. 1973); *State of Louisiana v. FPC*, 503 F.2d 844 (5th Cir. 1974).

The FPC thereafter set for hearing various issues concerning the propriety of tariff provisions which addressed the potential liability of UNITED for breach of contract during periods of curtailment. In its order of August 9, 1978, the FERC specifically set forth the tariff issues to be heard and made clear that the ultimate issue of contract liability was for courts to decide, applying state law.[10] Similarly, it made clear that it could not decide "negligence" and related issues.[11]

After lengthy hearings, a FERC administrative law judge decided that any blanket exculpation of a pipeline company from potential liability was against the public interest and held that an appropriate tariff for UNITED would allow the imposition of contract liability, even where partial deliveries were made pursuant to a FERC-approved curtailment plan, if the curtailments were caused by the "negligence, gross negligence, or willful and wanton misconduct" of UNITED.[12] The administrative law judge also offered a detailed analysis of UNITED's gas acquisition performance prior to the onset of curtailment and the FERC, in its opinion, said that these findings "imply that United's actions in these areas are attributable to improper management decisions and have a relationship to the curtailments United's customers

10. *United Gas Pipe Line Co.*, 4 F.E.R.C. (CCH) ¶ 61,151 at 61,355 (1978).

11. *Id.* at 61,356.

12. *United Gas Pipe Line Co.*, Initial Decision on Proposed Tariff Provisions, (September 14, 1982), 20 F.E.R.C. (CCH) ¶ 63,070 at 65,305. This decision contains other articulations of the appropriate standard.

experienced."[13] UNITED took exception to this decision, requesting the FERC to make specific findings that its conduct was proper, and "to specify that a uniform Federal standard of bad faith rather than common law negligence should be applicable to curtailment damage suits."[14] The FERC rejected UNITED's contentions and approved tariff language that allowed UNITED to curtail without liability only "in the absence of Seller's negligence, bad faith, fault or willful misconduct."[15]

UNITED thereafter petitioned the United States Court of Appeals for the Fifth Circuit for review of the FERC's orders but they were affirmed by the Court in relevant part.[16] The Court specifically rejected UNITED's contention that state courts applying state law should not be allowed to sit in judgment of an interstate pipeline company's actions.[17] The FERC's orders and the decision of the Fifth Circuit are final and not before this Court for review.

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13. Opinion No. 237, *United Gas Pipe Line Co.*, 31 F.E.R.C. (CCH) ¶ 61,336 at 61,774 n.12 (1985) (Pet. App. E at 124a, n.12). The FERC said that its decision to limit UNITED's tariff made it unnecessary to "adopt as findings any statements of the judge that appear to be conclusions on the facts and circumstances giving rise to curtailment" and that debate over these was "moot." *Id.* at 61,769 (Pet. App. E at 129a).

14. Opinion No. 237-A, *United Gas Pipe Line Co.*, 35 F.E.R.C. (CCH) ¶ 61,344 (1986) at 61,787.

15. *Id.* at 61,793 n.22 (Pet. App. F at 152a, n.22).

16. *United Gas Pipe Line Co. v. FERC*, 824 F.2d 417 (5th Cir. 1987) (Pet. App. G).

17. *Id.* at 428-29 (Pet. App. G at 181a-184a).

B. The State Court Proceedings

UNITED's attempts to interpose a "federal interest" defense to LP&L's contract claims took various forms in the state court proceedings. UNITED first sought removal of LP&L's claim to the United States District Court for the Eastern District of Louisiana by asserting that the case presented a federal question, but the federal district court held that the state court did have jurisdiction.[18] UNITED thereafter twice sought a stay of the state court proceedings, asserting that the FERC had primary or exclusive jurisdiction to consider LP&L's complaint and that numerous issues should be first referred to it. Those requests were denied by the state courts.[19] The case was then tried on the merits without a jury.[20]

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18. *City of New Orleans v. United Gas Pipe Line Co.*, 390 F.Supp. 861 (E.D.La.1974).

19. The District Court denied UNITED's motions June 26, 1979, and October 23, 1981. UNITED's application to the Louisiana Supreme Court for a remedial writ to order such a stay was also denied. *City of New Orleans v. United Gas Pipe Line Co.*, No. 81-C-3104, (La. Dec. 22, 1981).

A number of federal district courts hearing similar lawsuits did refer issues to the FERC, some of which the FERC refused to consider, including contract liability and negligence issues. *United Gas Pipe Line Co.*, 4 F.E.R.C. (CCH) ¶ 61,150 at 61,352-355 (1978). One federal district court withdrew its referral order, citing inordinate delay. *Texasgulf, Inc. v. United Gas Pipe Line Co.*, 610 F. Supp. 1329, 1332 (D.C. D.C. 1985), *mooted by settlement*, 617 F.Supp. 41 (1985).

20. The trial was one of the longest in state history. It began on January 7, 1982 and ended on April 5, 1984. Over 42,000 pages of testimony were transcribed and over 1600 exhibits were accepted into evidence. Most of the disputed factual issues related to the inadequacy of UNITED's performance which led to its inability to deliver contract quantities.

Contrary to UNITED's fundamental, but erroneous, assertion to this Court, the state courts fully acknowledged the federal interest in curtailments and UNITED's FPC/FERC tariffs. The District Court, in its Reasons for Judgment, squarely stated that:

> "Although curtailment tariffs and FPC/FERC curtailment orders would ordinarily exculpate a pipeline from contractual liability for curtailments, such tariffs and orders in this case will not exculpate United from its liability herein because the Court is of the opinion that United's shortage of supply was induced by the unrealized expectations and imprudent decisions of United and its management."[21]

The District Court supported its opinion of imprudent management by UNITED with specific and lengthy findings of fact. UNITED's disagreement with these findings forms the basis of its petition to this Court but such a factual dispute does not justify a writ of certiorari.[22]

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21. Pet. App. C at 94a. Although UNITED states the District Court did not specifically find it "negligent" (Pet. 9, n.9), this is an effort to obfuscate through semantics since the District Court repeatedly found it "imprudent," (Pet. App. C at 89a, 90a, 94a, 97a), "improvident," (Pet. App. C at 85a, 86a, 90a), not exercising "due diligence," (Pet. App. C at 89a, 97a) and replete with "failure" (Pet. App. C at 84a, 85a, 86a, 89a, 90a, 91a, 97a).

22. The granting of a writ of certiorari to review a matter that primarily involves questions of fact is improvident. *NLRB v. Hendricks County Rural Electric Corp.*, 454 U.S. 170, 176 n.8 (1981); *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508, 509 (1924). This Court has declared its reluctance to disturb factual findings to be particularly great where, as here, two courts below have concurred in the findings. *United States v. Doe*, 465 U.S. 605, 613-14,

On appeal to the Louisiana Court of Appeal, UNITED again erroneously argued that some federal interest totally preempted the state court's ability to decide the case. Alternatively, it argued that it could only be held liable if some "willful misconduct" were shown.[23] UNITED specifically urged the Louisiana Court of Appeal *not* to apply the standards established by the FERC in its Opinion No. 237.[24]

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22. (continued)

(1984); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982); *Berenyi v. Immigration Director*, 385 U.S. 630, 635 (1967); *Blau v. Lehman*, 368 U.S. 403, 408-09 (1962); *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949).

The findings of fact made by the District Court, and affirmed by the Louisiana Court of Appeal, are reasonable and fully supported by the record. They are similar and consistent with the findings of imprudent management made earlier by the FERC administrative law judge and those made later by the Honorable Gerhart Gesell, United States District Judge, in *Texasgulf, Inc. v. United Gas Pipe Line Co.*, *supra*.

23. In a Reply Brief to the Court of Appeal, UNITED argued: "In general, appellees agree with the trial court that the standard is whether United was 'imprudent' or 'improvident' in managing its gas supplies, while United asserts that some type of willful misconduct—as opposed to mere imprudence—must be shown." Reply Brief of UNITED, December 19, 1985, at 132.

24. In the same brief, UNITED argued: "While Opinion No. 237 concludes that culpability can consist of negligence in addition to 'bad faith, fault or willful misconduct,' the gross failing of the opinion is that it is entirely conclusory on the fault standard and never addresses the practical and policy reasons why a showing of simple negligence should not preclude a pipeline from relying on its tariff and/or Commission curtailment orders as a defense to curtailment damage claims." *Id.* at 144 (footnote omitted).

The Louisiana Court of Appeal rejected UNITED's argument that some federal interest required a higher degree of fault than the standard that was adopted by the FERC, but specifically acknowledged that the federal interest would override state law liability for breach of contract without fault:

> "The trial court concluded that federal curtailment orders and tariffs would not exculpate United from contractual liability for curtailments in the instant cases because United's shortage 'was induced by the unrealized expectations and imprudent decisions of United and its management.' United argues that the fault standard for determining whether exculpation lies under United's tariff and Commission orders is a federal fault standard, and that the federal standard is willful misconduct or reckless disregard of the pipeline's service obligations.
>
> "United does not cite any authority establishing this separate 'federal interest' argument. We conclude that it is inconsistent with the expressions of cases like *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 96 S.Ct. 1978, 48 L.Ed.2d 643 (1976); *International Paper Co. v. Federal Power Com'n*, 476 F.2d 121 (5 Cir. 1973); *Monsanto Co. v. Federal Power Com'n*, 463 F.2d 799 (D.C.Cir. 1972); and *Texasgulf, Inc. v. United Gas Pipe Line Co.*, 610 F.Supp. 1329 (D.C. D.C. 1985). These cases support the view that, *notwithstanding that federal orders or tariffs may override any state law liability akin to strict liability or liability without*

> *fault, breaches of contract not only by willful misconduct, but also by negligence or lack of due diligence, are governed by state law standards.* This defense seems to be no more than a restatement of the 'duly constituted authorities' clause defense discussed earlier, and we deem it equally insufficient to avoid United's liability."[25]

On April 30, 1987, the Louisiana Court of Appeal rendered its decision affirming the District Court's judgment of liability. On August 18, 1987, the United States Court of Appeals for the Fifth Circuit rendered its decision on UNITED's Petition for Review of FERC Order Nos. 237 and 237-A, rejecting UNITED's argument that a standard of a higher degree of culpability than that described by the FERC was required to support a judgment in contract and affirming in relevant part the FERC's orders. UNITED then filed a Petition for Rehearing in the Louisiana Court of Appeal, recasting its "federal interest" arguments to conform to its view of the Fifth Circuit opinion, along with a reurging of numerous other issues. The Louisiana Court of Appeal denied rehearing,[26] and the Louisiana Supreme Court denied UNITED's petition for a writ of certiorari or review.[27]

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25. Pet. App. A at 17a-18a (emphasis added).

The Court of Appeal also considered and rejected a myriad of alleged defenses offered by UNITED under the Louisiana Civil Code and the law of contracts. UNITED's complaint (Pet. at 21) that the Louisiana Court of Appeal "Regard[ed] the case largely as a private contractual dispute" is disingenuous since UNITED specifically urged such defenses to that court.

26. Pet. App. B at 76a.

27. Pet. App. D at 114a.

REASONS FOR DENYING THE PETITION

I. This Case Presents No Substantial Federal Question And Is Not Worthy of Review

The asserted need for this Court to protect "federal interests" is a pretext to salvage a case lost on the merits. As the Fifth Circuit observed in denying UNITED's Petition for Review of FERC Opinion Nos. 237 and 237-A:

> "United, then, fears application by courts and juries of Commission standards. While United's argument is expressed as a quest for a uniform federal standard to avoid undue prejudice or preference to anyone, its objective is plainly a uniform requirement of greater culpability to avoid judgments against it. United's arguments are not persuasive."[28]

No federal interest will be served by review of this case or reversal of LP&L's judgment, because the state courts which rendered that judgment fully acknowledged the federal interest. Moreover, any federal question that ever existed concerning the pipeline's liability under the federally approved tariff has been mooted by the assumption of UNITED's liability by others; the federal interest alleged to have been abused is the need to protect a pipeline company from contract liability for mere compliance with federal agency orders and to prevent a pipeline company from granting undue preferences or otherwise adversely affecting its other customers if such contract judgments are enforced.

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28. Pet. App. G at 177a.

UNITED, in its petition, quotes from Opinion No. 237 and argues:

> "The Commission pointed out that '[a]-wards under such circumstances would either directly (by being passed on through rate increases) or indirectly (through weakening the pipeline's financial condition) adversely affect the remaining customers of United.' "[29]

Yet, in its disclosure made pursuant to this Court's Rule 28.1, UNITED states that two wholly-owned subsidiaries of its former parent Occidental Petroleum Corporation have "assumed liability for the payment of any judgment that ultimately might be entered in this case."[30] Satisfaction of LP&L's judgment, therefore, will have absolutely no effect on United Gas Pipe Line Company, its jurisdictional ratepayers, any aspect of its business, or any matter before the FERC.

UNITED makes no showing that its liability flows from mere compliance with agency orders; the state courts specifically found otherwise. Even if such a showing could be made, it would only present a moot federal question since the liability will not be borne by the entity that claims it did nothing more than follow agency orders.

Moreover, while UNITED contends that is alleged issues are not "solely of historical interest,"[31] such is clearly the case. No pipeline company is in curtailment today and the

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29. Pet. at 19.

30. Pet. at ii-iii.

31. Pet. at 25.

industry is faced with oversupply.[32] UNITED has settled all other active lawsuits.[33] Only one other pipeline company faced significant liability for curtailment, and it has settled an adverse judgment.[34]

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32. The most significant question facing the interstate pipeline industry today is who will bear the cost of this oversupply, especially as the interstate pipeline companies become "open access" transporters of gas sold by others. The FERC has estimated the accrued liability of interstate pipelines for this oversupply to be over $8 billion, but expressed hope that it would be reduced by settlements. *Notice of Issuance of Proposed Policy Statement and Opportunity for Public Comment*, 38 F.E.R.C. (CCH) ¶ 61,230 at 61,725 (1987).

33. UNITED describes these settlements in its Petition at 7, n.6. The FERC acknowledged without complaint UNITED's $112 million settlement with another electric utility in its Opinion No. 237. (Pet. App. E at 123a).

In the same footnote UNITED describes as "currently pending" a suit for breach of contract by Mississippi Power Company. While it may be true that the case has not been formally dismissed, recent inquiry at the United States District Court for the Southern District of Mississippi reveals that the last action of any party was July 11, 1977 and on January 21, 1985, the court entered a minute entry stating in part " . . . [T]here appears to be no further reason at this time to maintain file as an open one for statistical purposes." *Mississippi Power Co. v. United Gas Pipe Line Co.*, No S74-258 (L) (S.D. Miss.) (Resp. App. A at 1a).

34. The FERC considered disputed tariff provisions for Transcontinental Gas Pipe Line Corporation (Transco) in Opinion No. 248, *Transcontinental Gas Pipe Line Corp.*, 35 F.E.R.C. (CCH) ¶61,043 (1986) and Opinion No. 248-A, *Transcontinental Gas Pipe Line Corp.*, 35 F.E.R.C. (CCH) ¶ 61,340 (1986). A federal jury had found Transco liable for breach of contract and, on appeal, the United States Court of Appeals, Fourth Circuit, stayed the proceeding and referred certain issues to the FERC. *CF Industries, Inc. v. Transcontinental Gas Pipe Line Corp.*, 614 F.2d 33 (4th Cir. 1980). Transco, joined by UNITED as intervenor, urged the FERC to "adopt a uniform Federal standard

Further, the natural gas pipeline industry has fundamentally changed. Long-term industrial contracts, such as those between LP&L and UNITED, are relics of the past; UNITED's last contract with LP&L was entered into in 1968 and expired December 31, 1987. Natural gas prices were partially deregulated, and the possible disparity of supplies available to interstate and intrastate markets was largely eliminated by the passage of the Natural Gas Policy Act in 1978.[35] A fundamental shift in the nature of the business of interstate pipeline companies has occurred as the FERC has sought to "unbundle" the services traditionally rendered by pipeline

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34. (continued)

of prudent pipeline management" but the FERC declared that these were "new versions of arguments rejected in Opinion No. 237." 35 F.E.R.C. at 61,781-2.

The proceeding referenced at page 17, n.18, of UNITED's petition was Transco's and UNITED's Petitions for Review of FERC Order Nos. 248 and 248-A which were dismissed in an unpublished memorandum opinion. *Transcontinental Gas Pipe Line Corp. v. FERC*, No. 86-1358 (D.C. Cir., order entered Feb. 16, 1988, order on rehearing entered April 22, 1988) (Resp. App. B at 6a). UNITED's reference to this proceeding suggests this order supports its argument here; to the contrary, the Court stated:

> "Accordingly, we uphold the Commission's determination that where the pipeline is itself at fault for causing the shortage of gas, whether through negligence or greater misconduct, trial courts are not precluded from holding the pipeline liable."

When the case returned to the Fourth Circuit, it was settled and dismissed on the joint agreement of the parties. *CF Industries, Inc. v. Transcontinental Gas Pipe Line Corp.*, No. 79-1366 (4th Cir., order entered June 23, 1988) (Resp. App. C at 18a).

35. 15 U.S.C. § 3301 *et seq.*

companies.[36] Interstate pipeline companies, including UNITED, are now primarily transporters, not sellers, of natural gas.[37]

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36. The FERC has identified three orders as part of the "unbundling of natural gas services which the Commission has endeavored to foster." *Notice of Issuance of Proposed Policy Statement and Opportunity for Public Comment*, 38 F.E.R.C. (CCH) ¶ 61,230 at 61,726 (1987). These orders are Order No. 380, FERC Statutes and Regulations, Regulations Preambles 1982-1985 (CCH) ¶ 30,571 (1984) (elimination of variable cost minimum bills), *aff'd in part and remanded in part sub nom. Wisconsin Gas Co. v. FERC*, 770 F.2d 1144 (D.C. Cir. 1985), *cert. denied*, 106 S.Ct. 1968, 1969; Order No. 436 FERC Statutes and Regulations, Regulations Preambles 1982-1985 (CCH) ¶ 30,665 (1985) (open access transportation), *vacated and remanded sub nom. Associated Gas Distrib. v. FERC*, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 108 S.Ct. 1468, 1469 (1988); and Order No. 451, FERC statutes and Regulations (CCH) ¶ 30,701 (1986) (revised price structure for old gas), *appeal pending sub nom. Mobil Oil & Exploration Co. v. FERC*, No. 86-4940 (5th Cir.). *See also*, Order No. 500, FERC Statutes and Regulations (CCH) ¶ 30,761 (1987), *appeal pending sub nom. American Gas Assoc. v. FERC*, No. 87-1588, *et al.* (D.C. Cir.).

37. Since the passage of the Natural Gas Policy Act in 1978, transportation has been an ever increasing part of the business of interstate pipeline companies. According to the most recent Department of Energy statistics, in 1986 "major pipeline companies" delivered a total of 29,493,295 mmcf of gas of which 7,816,259 mmcf (27%) were sales and 9,619,897 mmcf (33%) were transported for others. In 1979, total deliveries were 31,198,565 mmcf with sales accounting for 15,087,895 mmcf (48%) and transportation 4,284,521 mmcf (14%). Department of Energy, Energy Information Administration. *Statistics of Interstate Natural Gas Pipeline Companies 1986* at 56-7. At trial, UNITED's president testified that UNITED then earned little revenue from selling transportation services (R., Tr. 27518).

On Oct. 2, 1987, United Gas Pipe Line Company applied for a "blanket, self-implementing certificate authorizing the open-access transportation of natural gas for interstate pipelines and other shippers" which was granted by the FERC on January 15, 1988. *United Gas Pipe Line Company*, 42 F.E.R.C. (CCH) ¶ 62,027 at 63,062 (1988).

Review of this case will not resolve any important question of law and policy; instead, it would be a simple review of the facts from a voluminous record to determine if the state courts were in error when they found that "the unrealized expectations and imprudent decisions of United and its management" were the causes of UNITED's failure to deliver to LP&L. This case *is* only of historical interest; curtailments are a decade past, and it was UNITED's performance in the 1960's and earlier that was scrutinized.[38] The evidentiary record UNITED asks this Court to review has been closed for over four years.

II. Federal and State Interests Are Not in Conflict

Although UNITED seeks to use federal regulation for its own purposes, it concedes, as it must, that "[s]ome regulation of interstate pipeline activities under state law is also contemplated under the NGA . . ." (Pet. at 3). In rejecting UNITED's attack of FERC Opinion Nos. 237 and 237-A, the Fifth Circuit noted:

> "First, the federal regulations are not comprehensive. Although the Natural Gas Act and the Natural Gas Policy Act regulate much of the natural gas industry, 'the federal scheme of regulation . . . is limited in its displacement of state regulatory authority.'
>
> "Second, the federal interest is to protect the federal curtailment scheme. Hence, the Commission determined that the public

38. At trial, UNITED actually attempted to trace its difficulties to this Court's 1954 decision in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, finding FPC jurisdiction over the price of gas at the wellhead.

interest required the abrogation of contract liability based solely on compliance with a filed curtailment plan, but did not require exculpation when a pipeline causes the shortage by negligence or wrongful misconduct. That is, the Commission determined that the public interest required exculpation only when the basis for contract liability directly conflicts with the federal curtailment plan, but no more. The Commission's determination of the public interest is rational and adequately supported by reasons and findings."[39]

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39. Pet. App. G at 177a-178a (Citation omitted).

The Court relied on its analysis in *Pennzoil Co. v. FERC*, 645 F.2d 360 (5th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982), in which it held that variations in the states' contract laws must be observed in the application of a FERC order to "area rate clauses" in producer-pipeline supply contracts. *Id.* at 383-84.

This Court has held in many contexts that state and federal law schemes have application under the Natural Gas Act. In *Federal Power Commission v. Louisiana Power & Light Co.*, *supra* at 631, this Court cited its decision in *Panhandle Eastern Pipe Line Co. v. Public Service Commission*, 332 U.S. 507(1947) and noted, "Congress 'meant to create a comprehensive and effective regulatory scheme' . . . of dual state and federal authority." The "*Mobile-Sierra* doctrine" enunciated by this Court makes clear that the Natural Gas Act is not authority for the unnecessary abrogation of contracts governed by state law. *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956). Further, it is well-established that natural gas contract disputes do not arise under the Natural Gas Act such that federal question jurisdiction would lie in federal courts. *Phillips Petroleum Co. v. Texaco, Inc.*, 415 U.S. 125 (1974); *Pan American Petroleum Co. v. Superior Court of Delaware*, 366 U.S. 656 (1961); *Shelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950).

Further, in a holding that completely refutes UNITED's position here, the Fifth Circuit answered UNITED's demand for a "uniform federal standard of liability" by declaring that the FERC had created such a standard: contract fault drawn from the states' laws of negligence and fault.[40] The Louisiana state courts heard all the evidence and every argument the parties could muster concerning UNITED's conduct and made reasonable factual determinations that UNITED's shortage was caused by UNITED's own mismanagement. The "uniform federal standard of liability" was met.

Contrary to the picture UNITED attempts to paint of a "potentially more sympathetic state court" (Pet. at 16) challenging federal interests, the Louisiana courts here recognized and gave full weight to UNITED's FERC tariff and the FERC's views as expressed in Opinion Nos. 237 and 237-A.[41] When fairly read, both the District Court's Reasons for Judgment[42] and the Louisiana Court of Appeal's

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40. Pet. App. G at 180a-185a.

41. While expressing "no opinion about the case," the Fifth Circuit stated that "United may have legitimate concerns" about the state court's treatment of federal interests. (Pet. App. G at 181a-182a, n.15). In its petition, at 13-14, UNITED alters this to claim that "the Fifth Circuit acknowledged that United had 'legitimate concerns' about the Louisiana courts' failure, up to that time, to honor the standard established by the Commission." In addition to paraphrasing unfairly the Court, UNITED ignores the fact that "up to that time" it argued to the Louisiana courts that Opinion No. 237 was in error. *See*, n.23, 24, *supra*.

42. UNITED asserts (Pet. at 9): "The trial court ruled that the sole issue presented was whether United's curtailments breached its delivery obligation." App. C at 84a is offered as a citation but at that page the Court actually referred to "the ultimate issue." The following pages of the District Court's opinion clearly show its consideration of the imprudence of UNITED's actions leading to its breaches of contract.

opinion fully comply with the standards of liability established by the FERC and upheld by the Fifth Circuit over UNITED's challenge. Ultimately, UNITED's complaint is merely that the Louisiana Court of Appeal, after considering UNITED's contention that FERC Opinion No. 237 was wrong, and after issuing a comprehensive opinion on this massive contract dispute, should have issued a second opinion on rehearing after the Fifth Circuit rejected UNITED's attack on Opinion No. 237. The Louisiana Court of Appeal had no obligation to do this, especially since its opinion fully acknowledged the federal interest as determined by the FERC and as expressed in UNITED's tariffs. The Louisiana Court of Appeal certainly considered the Fifth Circuit opinion since United extensively argued for a rehearing based upon it, but the Court of Appeal apparently found it presented nothing new or nothing that would change the result.[43]

Similarly, the Supreme Court of Louisiana had no obligation to grant UNITED's application to it for writs and its refusal to do so is not reviewable by this Court.[44] The

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43. The result in the Fifth Circuit was a denial of UNITED's Petition for Review of FERC Opinion Nos. 237 and 237-A which UNITED had told the Louisiana Court of Appeal were in error. UNITED gained no rights from its defeat and there was no change in the applicable law. Under Louisiana law, rehearing need not be granted to address even a correctly specified error if the result would not change. *Alleman v. Houston Fire & Casualty Insurance Co.*, 142 So.2d 846 (La. App. 1st Cir. 1962).

44. UNITED correctly styles its Petition as one for a "Writ of Certiorari to the Louisiana Court of Appeal, Fourth Circuit" but nevertheless makes an unwarranted attack on the Louisiana Supreme Court (Pet. at 14).

UNITED complains (Pet. at 16, n.17) that LP&L argued to the Louisiana Supreme Court that "This Court Is Not Bound By The Fifth

Louisiana Supreme Court also had the Fifth Circuit opinion before it and there is no basis in logic or fact for UNITED's speculation that the Louisiana Supreme Court rejected that opinion; a more reasonable conclusion is that it found the lower state courts' decisions to be entirely consistent with the federal court decision.

UNITED's ponderous attempt to create an issue worthy of review by suggesting that exclusive statutory provisions for review of FERC orders were challenged (Pet. at 13-17) should be dismissed as frivolous. UNITED cannot point to a single word in the opinions issued by the Louisiana courts on this matter that is remotely a challenge to the Federal Energy Regulatory Commission's Opinion Nos. 237 and 237-A, or the decision of the United States Court of Appeals for the Fifth Circuit. At best, UNITED can claim disappointment, but not a federal question worthy of review by this Court, over the refusal of the Louisiana Court of Appeal to reconsider the case after UNITED's sudden adoption of Opinion No. 237 subsequent to the Fifth Circuit's rejection of UNITED's attack on that opinion, or because the Louisiana Supreme Court did not grant its application for writs.

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44. (continued)

Circuit Opinion." United had erroneously argued the contrary from a 1931 Louisiana Supreme Court decision that was no longer the law. Louisiana law is that United States Supreme Court decisions on federal issues are binding authority, but lower federal court decisions are merely persuasive. *See, e.g., State v. Selman*, 300 So.2d 467 (La. 1974).

LP&L's principal argument to the Louisiana Supreme Court was that the judgment below was consistent with the Fifth Circuit opinion and that UNITED misread the Fifth Circuit opinion, but if UNITED were right, the Fifth Circuit must have overstated the case and Opinion No. 237 should be followed, not the Fifth Circuit. LP&L would make the same argument to this Court.

The state court opinions are not a challenge to any federal agency order; they are, instead, a model application of federal tariffs to a state law contract dispute with complete deference being given to the agency's orders as affirmed on appeal. UNITED's argument is really a suggestion that this Court should monitor every application of an agency rule after it has been properly reviewed. Certiorari should not be granted for such an impossible endeavor.

In a further effort to show conflict where none exists, UNITED claims that some of the actual findings of its imprudent conduct made by the state courts conflict with unspecified previous actions of the FERC. Thus, it argues that "some" of the additional sales and "most" of the released reserves found by the state courts to be imprudently made were "authorized by the Commission."[45] The FERC itself rejected similar arguments when made by UNITED in the *Transco* case, holding that such findings by trial courts did not constitute a collateral attack on its orders and pointing out that the FPC had maintained a "policy of relying on pipeline management to maintain adequate reserves."[46]

UNITED repeatedly focuses on the reference by the Louisiana Court of Appeal to "implied obligations to have and maintain, or to acquire, at whatever cost, the gas necessary to fulfill the explicit delivery obligations."[47] UNITED suggests that its breach of such obligations cannot be proof of negligence or imprudence since interstate pipelines also

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45. Pet. at 24, n.27.

46. Opinion No. 248-A, *Transcontinental Gas Pipe Line Corp.*, 35 F.E.R.C. (CCH) ¶61,340 at 61,782 (1986). *See also, United Gas Pipe Line Co., Initial Decision, supra*, at 65,292.

47. Pet. App. A at 9a, discussed by UNITED, Pet. at 11 and 21-3.

have obligations not to "unduly increase costs to customers." (Pet. at 23).

UNITED's emphasis is misplaced. First, this is but one of many imprudent acts the state courts found,[48] and, secondly, the Court of Appeal points to these obligations to obtain supply in its analysis of defenses raised by UNITED under Louisiana contract law. Moreover, it *was* imprudent for a pipeline to enter into firm, non-jurisdictional contracts, to which its curtailment tariff did not then apply, while releasing old reserves and not acquiring at any level of cost, let alone "whatever cost," new and needed reserves.[49] UNITED's principal contract with LP&L was entered into on May 6, 1968, for a twenty-year firm supply of natural gas for a new generating unit contemplated to be in operation on January 1, 1971, but UNITED announced on October 26, 1970 that it did not have a sufficient supply and would be unable to perform. Surely, the state courts reasonably found imprudence by UNITED in these facts.

In an attempt to gain partial victory, UNITED repeatedly argues (Pet. at 10, n.10; 15, n.15; 24-25) that its curtailments

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48. Elsewhere the Court of Appeal noted: "The trial judge's factual conclusion, reasonably supported by the record, was that by the exercise of due diligence, in not releasing reserves, in acquiring reserves when it could have done so, and in not committing itself to further deliveries by added sales atop its preexisting contractual obligations, United could have prevented the shortage that its own actions caused." Pet. App. A at 16a.

49. The FERC administrative law judge had found "[I]t is significant that during the 1960's United was the only pipeline company that released reserves. What is particularly disturbing is that the Company, according to its witnesses, gave up the reserves without even studying the impact of the loss on United's supply situation." *United Gas Pipe Line Co., Initial Decision, supra*, at 65,297.

subsequent to FPC Opinion No. 647 should be distinguished from its other curtailments because LP&L thereafter was placed in a lower priority and received less gas than before from UNITED. The state courts fully considered UNITED's argument and found it erroneous. The District Court found:

> "As part of a series of curtailment plans, the FPC placed deliveries of power plant gas in a fourth or lowest category of priority. United contends that this action of the FPC exonerates it from liability for any increased fuel cost. Opinion 647 of January 12, 1973 (49 FPC 179) was issued in Docket RP 71-29, a proceeding before the FPC initiated by United on October 26, 1970. The only reason for United's application was that it had developed a shortage of gas on its interstate system. It thus requested the FPC to allocate deliveries of its remaining inadequate gas supplies between its customers pursuant to a curtailment proposal included in its application. Subsequently, during the ensuing decade, a number of different plans were submitted by United for approval by the FPC. The FPC thereafter issued a series of orders allocating United's available gas supplies. Such orders were entered after vigorous participation in the proceedings by United and others. All such orders were appealed to the United States Fifth Circuit Court of Appeal, which ultimately held that the plans approved by the FPC were unlawful and not in the public interest; accordingly the Court remanded the proceedings to the FPC. Hence, Order 647 is but one in a series of orders the FPC issued as a direct result of United's

shortage on its interstate system and application for governmental intervention. That order, too, was vacated in *State of Louisiana v. FPC*, 503 F.2d 844 (5th Cir. 1974) over the opposition of United.

> "The Court is of the opinion that *the shortage is the cause of the damages, not the action of the FPC in trying to deal with the results of United's shortage. The curtailment orders did not cause the shortage, United's imprudent management decisions caused its shortage.* United's failure to deliver the contract volumes is not attributable to the FPC's curtailment plans proposed and supported by United. Its failure is due to a shortage of gas on its systems which United could have avoided by the exercise of due diligence."[50]

The FERC, in another curtailment case, used similar logic in allowing liability where a negligently created shortage caused resort to an FPC-approved curtailment plan:

> "As indicated in Opinion No. 248, recovery of damages for breach of contract (or other contract-based cause of action, such as promissory estoppel) arising out of curtailment will be prevented by a pipeline's adherence to an approved curtailment plan in administering curtailments, *unless there is a showing of negligence or misfeasance in causing the*

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50. Pet. App. C at 96a-97a (emphasis added). The Louisiana Court of Appeal also rejected these contentions. Pet. App. A at 20a-21a.

> *shortages that result in having to resort to use of the curtailment plan.*"[51]

It was UNITED's self-induced shortage that caused LP&L's damages and not the efforts of the FPC to deal with the emergency presented to it by UNITED.

UNITED concludes its Petition by claiming it "cannot serve two masters," and that the FERC cannot be "at war with various state bodies or courts."[52] There is no war and, yes, UNITED must serve two masters. It must manage its affairs prudently in accordance with both federal and state law schemes. As the Fifth Circuit explained:

> "[U]niformity of result is needed only to protect the federal interest, that is, only to exculpate United from contract liability in all cases not based on United's fault. Uniformity of exculpation beyond those cases is not a matter of federal concern, for liability then does not create incentives for United to resist a federal curtailment scheme. Rather, liability flows only from United's mismanagement in causing the shortage of gas, creating incentives for United to manage properly its gas supply and demand."[53]

The state courts found such mismanagement and UNITED's liability is not a matter of federal concern.

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51. Opinion No. 248-A, *Transcontinental Gas Pipe Line Corp.*, 35 F.E.R.C. (CCH) ¶ 61,340 at 61,783 (1986) (footnotes omitted, emphasis added).

52. Pet. at 26.

53. Pet. App. G at 180a.

CONCLUSION

For all of these reasons the petition should be denied.

Respectfully submitted,

MONROE & LEMANN
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Counsel of Record
Terrence G. O'Brien
Kathryn J. Lichtenberg
201 St. Charles Avenue
New Orleans, LA 70170-3300
(504) 586-1900

ATTORNEYS FOR RESPONDENT,
LOUISIANA POWER & LIGHT COMPANY

September 27, 1988

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

CIVIL ACTION NO. S74-0258(N)

MISSISSIPPI POWER COMPANY
PLAINTIFF

VS.

UNITED GAS PIPE LINE COMPANY
AND PENNZOIL COMPANY
DEFENDANTS

MISSISSIPPI PUBLIC SERVICE COMMISSION
(INTERVENOR)

SOUTHERN DISTRICT OF MISSISSIPPI
F I L E D
JAN 21 1985
CLARENCE A. PIERCE, CLERK
BY _____ DEPUTY
(stamp)

MINUTE ENTRY ORDER

This case having been pending for over three years, all presently contemplated proceedings having been completed, and there having been no action herein for over 12 months, there appears to be no further reason at this time to maintain the file as an open one for statistical purposes, and the Clerk is instructed to submit a JS-6 form to the Administrative Office.

Nothing contained in this minute entry shall be considered a dismissal or disposition of this matter, and should further proceedings in it become necessary or desirable, any party may initiate it in the same manner as if this minute entry had not been entered.

SO ORDERED this the 21st day of January, 1985.

s/s Walter L. Nixon, Jr.
UNITED STATES DISTRICT JUDGE

A TRUE COPY OF A CERTIFIED COPY, I DO HEREBY CERTIFY,
CLARENCE A PIERCE, CLERK
By: s/s M. Marie

A TRUE COPY, I HEREBY CERTIFY.
Clarence A. Pierce, CLERK
BY:
s/s D. Floyd
Deputy Clerk
(stamp)

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
UNITED STATES COURTHOUSE
333 CONSTITUTION AVENUE, N.W.
WASHINGTON, D. C. 2001-2856

CONSTANCE L. DUPRE'
CLERK

GENERAL INFORMATION
(202) 535-3300

February 16, 1988

RE: 86-1358 - Transcontinental Gas Pipe Line Corporation v. FERC

Dear Counsel:

I am enclosing herewith a copy of the judgment of this Court entered today in the above entitled case.

Sincerely,

s/s Denise C. Thomas
Denise C. Thomas
Opinions Clerk

enclosure

DISTRIBUTION:

Christopher T. Boland, Esquire
David E. Varner, Esquire
Thomas F. Ryan, Jr., Esquire
Andrea Wolfman, Esquire
Stephen A. Herman, Esquire
John E. Cheatham, III, Esquire
James R. Lacey, Esquire
Peter J. Levin, Esquire
Gregory Grady, Esquire
F. Kent Burns, Esquire
Morton L. Simons, Esquire
Glenn W. Letham, Esquire

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-1358 September Term, 1987

Transcontinental Gas Pipe Line Corporation,
Petitioner

v.

Federal Energy Regulatory Commission,
Respondent

CF Industries, Inc., et al.,
Interstate Natural Gas Association of America,
Public Service Electric and Gas Company,
United Gas Pipeline Company,
Public Service Company of North Carolina, Inc.,
North Carolina Utilities Commission,
Pennsylvania Gas and Water Company,
Intervenors

PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL ENERGY REGULATORY COMMISSION

Before: RUTH B. GINSBURG, BUCKLEY and SENTELLE
Circuit Judges.

JUDGMENT

This petition for review was heard on the record from the Federal Energy Regulatory Commission and was briefed and argued by counsel for the parties. The court has considered the issues presented and concludes that the petition occasions no need for a published opinion. *See* D.C. Cir. R. 14(c). For the reasons stated in the accompanying memorandum, it is

ORDERED and ADJUDGED, by the Court, that the orders of the Commission, to the limited extent indicated in the accompanying memorandum, be affirmed, and that all other issues remain open for adjudication in the proceeding now pending in the Fourth Circuit. It is

FURTHER ORDERED, by the Court, *sua sponte*, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. R. 15 (August 1, 1987). This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

Per Curiam
For The Court

s/s Constance L. Dupre
Constance L. Dupre
Clerk

(stamp)

No. 86-1358- **Transcontinental Gas Pipe Line Corp. v. FERC**

MEMORANDUM

To the extent that it addresses the issues presented here, we adopt as our own the well-reasoned position set forth in *United Gas Pipe Line Co. v. FERC*, 824 F.2d 417, 425-30 (5th Cir. 1987). Accordingly, we uphold the Commission's determination that where the pipeline is itself at fault for causing the shortage of gas, whether through negligence or greater misconduct, trial courts are not precluded from holding the pipeline liable.

In our view, all other issues Transco raises, including the meaning and effect of its certificates of public convenience and necessity, are most intelligently resolved in a case-specific context. As the Commission cogently argued in its brief to this court, those other issues are appropriately reserved for consideration and decision in the Fourth Circuit, as the court authorized to review the judgment for damages entered on the jury's verdict by the federal district court in North Carolina.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-1358 **September Term, 1987**

Transcontinental Gas Pipe Line Corporation,
Petitioner

v.

Federal Energy Regulatory Commission,
Respondent

CF Industries, Inc., et al.,
Intervenors

BEFORE: Ruth B. Ginsburg, Buckley and Sentelle, Circuit Judges

ORDER

Upon consideration of the Motion of Petitioner for Rehearing it is

ORDERED, by the Court, that the petition is denied in part and granted in part, as stated in the attached memorandum.

FOR THE COURT:

CONSTANCE L. DUPRE, CLERK

BY: s/s Robert A. Bonner
Robert A. Bonner
Deputy Clerk

No. 86-1358, Transcontinental Gas Pipe Line Corporation v. FERC

MEMORANDUM

In a motion for rehearing filed April 1, 1988, Transco asks us to rule dispositively on "the meaning and effect of [its] certificates of public convenience and necessity." Alternately, Transco requests "clarification of the effect of [our] February 16, 1988 rulings." We deny Transco's first request and grant its alternate plea for clarification to the limited extent stated herein.

In our February 16, 1988 disposition, we specifically upheld "the Commission's determination that where the pipeline is itself at fault for causing the shortage of gas, whether through negligence or greater misconduct, trial courts are not precluded from holding the pipeline liable." We so ruled based on *United Gas Pipe Line Co. v. FERC*, 824 F.2d 417, 425-30 (5th Cir. 1987). All further matters, we stated, "are appropriately reserved for consideration and decision in the Fourth Circuit, as the court authorized to review the judgment for damages entered on the jury's verdict by the federal district court in North Carolina." We adhere to that view.

In leaving the dispositive ruling on "the certificate issue" for Fourth Circuit adjudication in a case-specific context, we are mindful that the Commission distinguished the matter on which its predecessor (the FPC) ruled and the situation before the district court. *See Transcontinental Gas Pipe Line Corp.*, 35 F.E.R.C. ¶ 61,340, at 61,782-83 (June 16, 1986) (Order No. 248-A) (certificates granted on the basis of Transco's gas deliverability *at that time* plus anticipation that Transco, through "intensified efforts," would *in the future* successfully develop gas supplies).

Transco's understanding of our decision is correct, we clarify, to this extent: we fully intend that the Fourth Circuit "have the task of evaluating the aspects of the Commission's Opinions not reviewed by this Court." When it referred "the certificate issue" to the Commission, the Fourth Circuit observed: "After we have had the benefit of the Commission's decision . . . , we will be in a better position to consider these appeals and determine the proper procedure for reviewing the Commission's findings as well as their effect upon the pending litigation." *CF Industries v. Transcontinental Gas Pipe Line Corp.*, 614 F.2d 33, 36 (4th Cir. 1980). We leave the way clear for our sister court to proceed unencumbered by further advice disembodied from the case before it; as stated in our February 16 Judgment, all issues not passed on by this court remain open for adjudication in the proceeding now pending in the Fourth Circuit.

APPENDIX C

ANDREWS & KURTH
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June 16, 1988

BY FEDERAL EXPRESS

Mr. John M. Greacen, Clerk
United States Court of Appeals
for the Fourth Circuit
United States Courthouse
Tenth and Main Streets
Richmond, Virginia 23219

Re: Case Nos. 79-1359 and 79-1366; CF Industries, Inc. and Farmers Chemical Association, Inc. v. Transcontinental Gas Pipe Line Corporation

Dear Mr. Greacen:

The above-referenced litigation has been compromised and settled. Enclosed is a "Joint Agreement to Dismiss" in which CF Industries, Inc., Farmers Chemical Association, Inc., and Transcontinental Gas Pipe Line Corporation request that the pending appeals be dismissed pursuant to Rule 42(b) of the Federal Rules of Appellate Procedure.

A copy of the Joint Agreement has been served on all counsel of record.

Thank you for your long-continuing assistance in this matter.

Very truly yours,

s/s Priscilla R. Owen

Priscilla R. Owen

160/jd

cc: All Counsel of Record (w/encs.)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-1359
Consolidated with
No. 79-1366

CF INDUSTRIES, INC., and
FARMERS CHEMICAL
ASSOCIATION, INC.,

v.

TRANSCONTINENTAL GAS
PIPELINE CORPORATION

JOINT AGREEMENT TO DISMISS

Pursuant to Rule 42(b) of the Federal Rules of Appellate Procedure, CF Industries, Inc., and Farmers Chemical Association, Inc., Appellants and Appellees, and Transcontinental Gas Pipe Line Corporation, Appellant and Appellees, have agreed that the appeals pending herein should be dismissed, and that each party shall bear its own costs and any fees incurred by it.

WHEREFORE, the parties jointly request that these appeals be dismissed.

Respectfully submitted,

CF INDUSTRIES, INC., and
FARMERS CHEMICAL ASSOCIATION, INC.

BY: s/s E. Osborne Ayscue, Jr.
E. Osborne Ayscue, Jr.

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COUNSEL FOR
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A True Copy: Teste:
John R. Greacen, Clerk
By s/s Cheryl Hughes
Deputy Clerk
(stamp)

TRANSCONTINENTAL GAS PIPE
LINE CORPORATION

By: s/s Alfred H. Ebert, Jr.
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A True Copy: Teste:
John M. Greacen, Clerk
By s/s Cheryl Hughes
Deputy Clerk
(stamp)

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 79-1359

CF Industries, Inc. and Farmers Chemical Association, Inc.,

Appellants,

v.

Transcontinental Gas Pipe Line Corporation,

Appellee,

State of North Carolina,

Amicus Curiae,

Federal Energy Regulatory Commission,

Amicus Curiae,

Interstate Natural Gas Association of America,

Amicus Curiae.

No. 79-1366

CF Industries, Inc. and Farmers Chemical Association, Inc.,

Appellees,

v.

Transcontinental Gas Pipe Line Corporation,

Appellant,

State of North Carolina,

Amicus Curiae,

Federal Energy Regulatory Commission,

Amicus Curiae,

Interstate Natural Gas Association of America,

Amicus Curiae.

Appeals from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, District Judge.

Upon consideration of the joint agreement to dismiss,

IT IS ORDERED that these appeals are dismissed pursuant to Rule 42(b) of the Federal Rules of Appellate Procedure, with each party to bear its own costs and any fees incurred by it.

For the Court

s/s John M. Greacen
CLERK

A True Copy: Teste:
John M. Greacen, Clerk
By s/s Cheryl Hughes
Deputy Clerk
(stamp)